Supreme Court, U.S.
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No. 94-107

In The

Supreme Court of the United States

October Term, 1994

BRYAN VERCOE,

Petitioner,

vs.

FIRSTIER BANK, N.A., OMAHA, As Trustee of the Profit Sharing Plan and Employees Trust of Land Paving Company, *et al.*,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

A. Proceedings Below.

At all times relevant hereto, FirsTier Bank, N.A. Omaha ("FirsTier"), has been the Trustee of the Profit Sharing Plan and Employees Trust of Land Paving Company ("Plan"). FirsTier brought a declaratory judgment action pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), Section 502(a)(1), 29 U.S.C. § 1132(e)(1) and 28 U.S.C. § 2201 to determine its status under the Plan.

Bryan Vercoe ("Petitioner") along with three other Plan participants (collectively "Counter-Plaintiffs") filed a Counterclaim and an Amended Counterclaim against FirsTier pursuant to ERISA Section 502(a)(3)(B), 29 U.S.C. § 1132(a)(3)(B) alleging that FirsTier had breached its fiduciary duties under ERISA Section 404(a)(1), 29 U.S.C. § 1104(a)(1) and had engaged in alleged acts of self-dealing prohibited under ERISA Section 406(b)(1), 29 U.S.C. § 1106(b)(1). The Counter-Plaintiffs also alleged causes of action against FirsTier under the Racketeer Influence and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq.*, and numerous common law claims arising under state law.

The trial court dismissed the RICO cause of action in a Memorandum Opinion and Order dated June 15, 1990 (Appendix p. 9). (Hereinafter all references to Petitioner's Appendix shall be designated as "App.") After reviewing the Supreme Court's decision in *H.J., Inc. v. Northwestern Bell*, 492 U.S. 229, 109 S. Ct. 2893, 106 L. Ed. 2d 195, 208-210 (1989), the trial court ruled that the United States Supreme Court provides two methods by which the

threat of criminal continuity can be established and that it was "clear to the Court that the allegations in this case do not meet the test for establishing a pattern of racketeering activity." (App. 11).

The trial court also dismissed the state law causes of action.

Trial on the ERISA claims was held before the Honorable William G. Cambridge. On December 6, 1991, the court entered a verdict for FirsTier and issued Findings of Fact and Conclusions of Law. (App. 13-29). On February 16, 1994, the U.S. Court of Appeals for the Eighth Circuit affirmed the trial court's decision in all respects as to FirsTier. (App. 38-53).

B. Statement of Facts.

To the extent consistent with the trial court's June 15, 1990, Memorandum Opinion and Order and December 6, 1991, Findings of Fact and Conclusions of Law, Respondent generally agrees with the chronology of events recited in Petitioner's brief with the following qualifications.

First, Petitioner presents numerous facts to this Court which are not contained in the Appendix attached to Petitioner's Petition for Writ of Certiorari (*e.g.*, Petitioner states: "The foregoing [loans] represented the maximum amount each of the four employees could borrow. . . . FirsTier never . . . determined that the employees were not being coerced, [and never] informed the employees that the transaction was a breach of trust, or informed the employees that Land Paving was in danger of defaulting

on their loan to FirsTier." (Petition for Writ of Certiorari page 4) (Hereinafter all references to Petitioner's Petition for Writ of Certiorari shall be designated ("Pet."))

Second, Petitioner also recites facts which are clearly contrary to the trial court's Findings of Facts. For example, on page 20 of his brief, Petitioner states: "Additionally, all of the [1984] loans were still outstanding [in 1987]." (Pet. 20). In fact, by 1987, one of the 1984 loans had been fully repaid. (App. 15).

Third, Petitioner fails to recite facts which may have a bearing on questions that would be properly before the Court (*e.g.*, on the RICO issue: "The record reflects the following in regard to this loan: Mr. Lonergan knew that the money was supposedly borrowed from the Plan to loan Land Paving or Dombrowski to pay off Dombrowski's bid rigging fine; Mr. Lonergan neither talked to anyone at FirsTier regarding the February 22, 1984 loan nor disclosed the purposes of the borrowing; FirsTier had no knowledge of the loan's purposes. . . . [t]he Counter-Plaintiffs . . . have not produced any evidence tending to show that Firstier [sic] had knowledge of the purpose of the $42,500 loan made to Lonergan in 1984, or that making the loan was improper." (App. 8). And on the relative weight given to testimony by various witnesses which resulted in the trial court's Findings of Fact and the issue of the appellate court's review of the trial court's Findings of Fact for abuse of discretion: "Bryan Vercoe signed the signature of Zeller's wife to a spousal consent form so that Zeller could obtain his loan." (App. 19)

For the purpose of focusing the Court's attention on the issues discussed in this brief, Respondent summarizes

and recites the trial court's Findings of Fact and Conclusion of Law which were affirmed by the Eighth Circuit Court of Appeals. (App. 13-29).

> "22. On April 1, 1987, Stanley Traub [the trust officer in charge of the Plan's trust account] received two letters signed by Anthony Dombrowski [the president of the company sponsoring the Plan ("LPC")] directing FirsTier to make loans from the Plan to . . . Plan participants. . . .
>
> 23. Section 20 of the Plan refers to loans to Plan participants as directed by the Company stating: ' . . . the trustee may, and shall at the direction of the company, make a loan or loans to a participant.' "

(App. 19).

> "28. FirsTier's trust department did not know the purpose or the use of the Plan loan proceeds, and FirsTier's loan department did not know the source of the credit loan payments from LPC to FirsTier.
>
> 29. . . . FirsTier was not aware of . . . [an] alleged threat by Mr. Dombrowski to the employees [of LPC].
>
> 30. The employees were not in fact threatened or coerced by either Mr. Dombrowski or by anyone else into borrowing the money from the plan or into loaning it to Anthony Dombrowski and LPC but they both so borrowed the money and so loaned it voluntarily and freely."

(App. 20).

> "34. The directions and the information available to FirsTier did not clearly or otherwise

indicate that FirsTier's issuance of the loans would be prohibited by the Plan or ERISA. . . .

35. As a directed Trustee, FirsTier did not have any obligation or responsibility under the Plan or under ERISA under the facts of this particular case to investigate or to inquire into the purposes of the loans to determine what the participants would do with the funds, and it did not have any duty to monitor the use of the loan proceeds.

. . .

39. FirsTier did not violate Section 404 or Section 406 of ERISA by making the subject April 1, 1987, or April 2, 1987, directed participant loans."

(App. 21).

"43. FirsTier did not know and should not have known under the facts and circumstances of this case that the Plan loans constituted indirect lending of money or other extension of credit between the Plan and the party in interest.

44. FirsTier did not know and should not have known under the facts and circumstances in this case that the Plan loans constituted indirect transfers to or use by or for the benefit of a party in interest of any assets of the Plan.

45. A Plan trustee is not required to make a thorough investigation when a Plan participant borrows under a Plan such as this when the employer as a fiduciary has the right to and does under the Plan direct it when the Plan as it does in this case says that the trustee shall make the loan and when the papers that are submitted

> do not clearly show any violation of either the Plan or the law (ERISA). . . . "

(App. 24).

The Eighth Circuit affirmed the trial court's Findings of Fact, stating:

> "Because FirsTier obeyed the Plan and the statute, the Participants may not shift to FirsTier responsibility for their own subsequent loss of the loan proceeds, or for the unknown misdeeds of another fiduciary, Dombrowski. Thus, on the specific facts of this case, we agree with the district court that FirsTier had no duty to inquire."

(App. 48-49).

While the Eighth Circuit Court of Appeals stated that the record might support a contrary finding, the court affirmed the trial court's express finding that Dombrowski did not coerce the participants into lending the participant loan proceeds to LPC. (App. 49). "Absent such coercion, there was no breach of fiduciary duty by *any* fiduciary." (App. 49) (emphasis added).

In addition to the foregoing facts, as found by the trial court and affirmed by the appellate court, the trial court found that Plan expressly provides recovery for attorneys fees and expenses incurred by FirsTier in connection with this litigation. Paragraph 10.i. of the Plan provides:

> "The Trustee shall have a lien upon the trust funds for any costs, attorneys fees, and other expenses incurred as a result of any suit or proceedings regarding the trust fund to which

> the Trustee is a party or is reasonably required to take the action, except when it is finally determined that the Trustee has breached its duties. . . . "

(App. 31). Pursuant to this provision, which is authorized by ERISA Section 408(c), 29 U.S.C. § 1108(c)(2), the trial court found that FirsTier was entitled to recover from the trust fund attorneys fees and expenses in the total amount of $64,912.44. (App. 33). Pursuant to the same provision, the Eighth Circuit Court of Appeals affirmed the trial court's award and found that FirsTier was entitled to recover an award of attorneys fees and expenses in an additional total amount of $23,434.70. (App. 54).

ARGUMENT

I. ERISA DOES NOT IMPOSE STRICT LIABILITY UPON A BANK TRUSTEE WHERE THE BANK, IN ITS COMMERCIAL LENDING CAPACITY, IS ALSO A CREDITOR OF THE EMPLOYER SPONSORING A PLAN.

Quoting dicta from *Brown v. Blue Cross and Blue Shield of Alabama, Inc.*, 898 F.2d 1556 (11th Cir. 1990), Petitioner would have this Court believe that the Eleventh Circuit held that an ERISA trustee who acts where a potential conflict of interest exists, without regard to the trustee's knowledge that it might benefit from the transaction, is per se strictly liable and the beneficiary may either void the transaction or force the trustee to disgorge all profits directly or indirectly realized as the result of the transaction. (Pet. 7-8). In fact, Petitioner's quotation from *Brown v. Blue Cross, supra*, is not the holding of the case. Rather,

the quoted passage is only a portion of the court's discussion of the amount of deference to be given to a discretionary trustee's decision where the existence of a conflict of interest is obvious to the trustee.

The Tenth Circuit has specifically held that it is not a per se conflict of interest for a bank to simultaneously serve both as plan trustee and as commercial lender to the plan sponsor. *Ershick v. United Missouri Bank*, 948 F.2d 660, 671 (10th Cir. 1991). *Ershick* provides a particularly apt analogy to the case at hand since it also involved the actions of a plan trustee taken at the direction of another named fiduciary. In *Ershick*, the plan's trustee bank was held not liable to plan participants with respect to investment activities that were allowed by the plan and which were undertaken only at the specific direction of the plan administrator. According to the terms of the plan, the trustee bank was required to follow the directions of the plan administrator. The court found no evidence suggesting that the bank utilized its position as trustee to further its own interests to the detriment of plan participants in violation of ERISA. *Id.* at 668.

In the present case, Petitioner failed to establish that FirsTier acted with any intent to enrich itself or had in any manner arranged to have the participant loan proceeds be paid to itself in its commercial lending capacity. The trial court specifically found that:

> "FirsTier's trust department did not know the purpose or use of the Plan loan proceeds, and FirsTier's loan department did not know the source of the credit loan payments from LPC to FirsTier. . . . FirsTier was not aware of . . . [an]

> alleged threat by Mr. Dombrowski to the employees."

(App. 20).

The knowledge of the plan trustee that it is engaging in a prohibited transaction in connection with an indirect loan to a party in interest is a prerequisite to finding that the trustee engaged in a prohibited transaction defined in ERISA Section 406, 29 U.S.C. § 1106. *Ershick, supra. Brock v. Citizens Bank*, 841 F.2d 344, 347 (10th Cir. 1988); and D.L.R. § 2550.408b-1(a)(4) E(3) (The example in the U.S. Department of Labor's participant loan regulations describes a participant loan program where an employer pressures its employees to borrow funds pursuant to the program and then reloan the proceeds to the employer. Another plan fiduciary, which is unaware of the employer's activities, makes the loans. Since the loans meet all of the conditions of ERISA Section 408(b)(1), 29 U.S.C. § 1108(b), *such loans are exempt from the prohibited transaction rules*. However, the employer's activity is a *separate* transaction which is not exempt under ERISA Section 408(b)(1). Note that the example does not place on the fiduciary making the loans a duty to determine the participants' purpose or the use of the loan proceeds or to determine whether the participants were pressured by their employer into requesting the loans.)

Stated simply, during the course of a four-day trial, Petitioner was unable to adduce any evidence that Firs-Tier in either its trustee or lending capacity knew or suspected that it would receive any direct or indirect benefit from the lawful participant loans that the trustee

was directed to make by another fiduciary in accordance with the terms of the Plan and ERISA.

II. PETITIONER HAS FAILED TO UNDERSTAND OR ACCEPT THE LIMITED FIDUCIARY DUTIES OF AN ERISA DIRECTED TRUSTEE AND WOULD IMPOSE ADDITIONAL DUTIES ON THE TRUSTEE WHERE NONE ARE CREATED BY ERISA.

Petitioner does not dispute that LPC directed FirsTier to make the loans in accordance with the terms of the Plan. According to Section 20 of the Plan, FirsTier was a directed trustee with respect to making participant loans at the direction of another named fiduciary.

While ERISA codified much of the common law of trusts, it also modified the common law in several important respects. *See, e.g. Mertens v. Hewett Assoc.*, ___ U.S. ___, 113 S. Ct. 2063, 124 L. Ed. 2d 161 (1993) (ERISA actions for "appropriate equitable relief" do not include some types of compensatory relief that are available at common law; 113 S. Ct. at 2064); and, *Massachusetts Mut. Life Ins. Co. v. Russell* , 473 U.S. 134, 105 S. Ct. 3085, 87 L. Ed. 2d 96 (1985) ("The principles of fiduciary conduct are adopted from existing trust law, but with modifications appropriate for employee benefit plans." 473 U.S. at, 152-53 n. 6, 105 S. Ct. at 3096 (*quoting* H.R. Rep. No. 93-533, p. 11, 13 (1973), *reprinted in* U.S.C.C.A.N. 4639, 4651.))

Petitioner quotes correctly the common law regarding the duties of a directed trustee. (Pet. 23) (*quoting* IIA *Scott on Trusts*, § 185 at 574 (4th ed. 1987)). However,

ERISA specifically provides that a qualified plan may provide that a trustee is:

> "[S]ubject to the direction of a named fiduciary who is not a trustee, in which case the trustee shall be subject to the proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to this Act."

ERISA Section 403(a), 29 U.S.C. § 1103(a)(1).

In the legislative history of ERISA, Congress set forth the standard of care that a directed trustee must follow in determining whether a direction is proper and in accordance with the terms of the plan and ERISA:

> "If the plan provides that the trustees are subject to the direction of named fiduciaries, then the trustees are not to have exclusive management and control over the plan assets, but generally are to follow the directions of the named fiduciary. Therefore, if the plan sponsor wants an investment committee to direct plan investments, he may provide for such an arrangement in the plan. In addition, since investment decisions are basic to plan operations, members of such investment committee are to be named fiduciaries. (For example, the plan could provide that the investment committee is to consist of persons who serve as the president, vice-president for finance and comptroller of the employer.) **If the plan so provides, the trustee who is directed by an investment committee is to follow the committee's directions *unless it is clear on their face* that the actions to be taken under those directions would be prohibited by the fiduciary responsibility rules of the bill or**

> **would be contrary to the terms of the plan or trust."**

Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. 3 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5079 (emphasis added, parentheses in original). The highlighted portion of the Conference Report shows clearly that Congress intended to depart from the common law's standard of care and duties as applied to a directed trustee of an ERISA plan.

That Congress intended to exonerate an ERISA directed trustee from liability, if it follows the foregoing standard of care and duties, is also demonstrated in the legislative history by the following:

> "As described above (*Establishment of trust*) the plan may also provide that the trustee is to be subject to the direction of named fiduciaries with respect to investment decisions. **In this case, if the trustee properly follows the instructions of the named fiduciaries, the trustee generally is not to be liable for losses which arise out of following these instructions.** (The named fiduciaries, however, would be subject to the usual fiduciary responsibility rules and would be subject to liability on breach of these rules.)"

Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. 3 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5082-83 (emphasis added, italics and parentheses in original).

However, Petitioner in the present case would impose additional duties upon directed ERISA plan trustees to determine the purpose of participant loans; to determine whether employees have been coerced in connection with requesting such loans, to inform participants that the transaction may constitute a breach of trust and to advise participants of their employer's financial condition and the wisdom of the investment. (Pet. 4). A directed trustee would also be required to inform participants requesting loans of their rights and provide all information and facts that the trustee knew or should have known and determine whether the transaction is fair and reasonable. (Pet. 13). Then, after having provided all of this information to the participants, the directed trustee would also be required to obtain consents from the participants, if it appears that the transaction might in any way result in an indirect extension of credit to a party in interest. (Pet. 14).

Neither ERISA, its legislative history, nor the regulations promulgated by the U.S. Department of Labor concerning participant loans support the imposition of these duties on a trustee in connection with participant loans generally and do not support the imposition of such duties on a directed trustee in particular. The trial court and the Eighth Circuit Court of Appeals correctly stated and applied the proper ERISA standard of care, and duties with respect to a trustee in connection with processing a participant loan to be made at the direction of another named fiduciary. The trial court stated:

> "ERISA requires a trustee to follow the directions of a named fiduciary if the plan so provides and if the directions do not clearly

> disclose on their face or the trustee does not know or the trustee should not have known that the directions are contrary to the Plan or ERISA."

(App. 20-21).

The Eighth Circuit Court of Appeals stated:

> "[W]e find nothing in the statute suggesting that, to be prudent, a trustee must ask the recipients of participant loans that are exempt under § 1108(b)(1) the purpose for which they are lawfully borrowing their share of the plan's assets. . . . But the Participants' real quarrel is with paragraph 20 of the Plan, which permitted LPC to direct participant loans which its employees could then use for a variety of high-risk purposes that the trustee could not prudently undertake on their behalf. Because FirsTier obeyed the Plan and the statute, the Participants may not shift to FirsTier responsibility for their own subsequent loss of the loan proceeds, or for the unknown misdeeds of another fiduciary, Dombrowski. Thus, on the specific facts of this case, we agree with the district court that FirsTier had no duty to inquire."

(App. 48-49).

III. PETITIONER FOR THE FIRST TIME RAISES THE SPECTER THAT FIRSTIER MAY BE LIABLE FOR THE BREACH OF A CO-FIDUCIARY. HOWEVER, THE TRIAL COURT FOUND AND THE APPELLATE COURT AFFIRMED THAT THERE WAS NO BREACH OF DUTY BY ANY FIDUCIARY.

In his brief, Petitioner for the first time raises the specter that FirsTier could be liable on account of a breach of duty committed by another fiduciary pursuant to ERISA Section 405(a)(2), 29 U.S.C. § 1105(a)(2). (Pet. 25). However, the trial court found no breach of fiduciary duty by any other fiduciary. (App. 20). The Eighth Circuit Court of Appeals affirmed this finding and concluded that "there was no breach of fiduciary duty by any fiduciary." (App. 49).

IV. THE COURTS BELOW DID NOT ABUSE THEIR DISCRETION IN AWARDING FIRSTIER ATTORNEYS FEES AND EXPENSES WHERE THE PLAN PROVIDES FOR THE PAYMENT OF SUCH FEES AND EXPENSES PURSUANT TO ERISA SECTION 408(c)(2), 29 U.S.C. § 1108(c)(2).

In his brief, Petitioner misleads this Court with the following statement:

> "In the Eighth Circuit's holding, the court cites as authority the case of *Leigh v. Engle*, 858 F.2d 361 (7th Cir. 1988) to support its per se award of fees. But immediately after the language quoted from *Leigh*, the Seventh Circuit applied the five factor formula. *Id.* at 369. Therefore, *Leigh* clearly does not stand for the proposition as cited, but for the need to apply an underlying standard in making an award."

(Pet. 18-19). In fact, the recitation of the five factor test for the award of attorneys' fees in the above-cited case (hereinafter *"Leigh II"*) is a restatement of a standard enunciated by the Seventh Circuit in connection with an earlier appeal of the same case that the court designated as *Leigh I. Leigh II*, 858 F.2d at 369, referring to *Leigh v. Engle*, 727 F.2d 113, 139 n. 39 (1984). Contrary to Petitioner's contention, in *Leigh II* , the Seventh Circuit *did not affirm but rather disavowed* the use of the five factor test in cases involving prevailing defendant trustees. It was the new standard enunciated in *Leigh II* that was cited by the Eighth Circuit Court of Appeals in affirming the trial court's award of attorneys' fees to FirsTier. (App. 50).

Section 10.i. of the Plan expressly provides for recovery of fees and expenses by FirsTier in a case such as this:

> "The Trustee shall have a lien upon the trust funds for any costs, attorneys fees, and other expenses incurred as a result of any suit or proceeding regarding the trust fund to which the Trustee is a party or is reasonably required to take action, except where it is finally determined that the Trustee has breached its duties. . . . "

(App. 31). Such a provision is specifically authorized by ERISA Section 408(c), 29 U.S.C. § 1108(c)(2) which provides for a fiduciary's reimbursement of expenses properly and actually incurred in the performance of its duties with the Plan. Where a trustee believes that it is necessary to seek the court's guidance as to its status with respect to the Plan and then is called upon to defend its actions with respect to the performance of its duties pursuant to the terms of the Plan, these proceedings give rise to

"expenses [which are] properly and actually incurred, in the performance of [its] duties with the plan." *Id.*

While the charges brought against FirsTier have proven groundless, FirsTier has incurred substantial expenses and legal fees to defend itself in the trial court, before the Eighth Circuit Court of Appeals and in connection with this Petition. The costs, expenses and fees incurred in prosecuting this case and defending Petitioner's counterclaims are far in excess of any fees it received as Trustee under the Plan. The five factor test urged by Petitioner cannot be made applicable to the case at hand. The five factor test "is oriented toward the case where the plaintiff rather than the defendant prevails and seeks an award of attorney's fees." *Bittner v. Sadoff & Rudoy Indus.*, 728 F.2d 820, 829 (7th Cir. 1984). The Seventh Circuit's pronouncement in *Leigh II* is particularly appropriate for this case:

> "The trust instruments allow for reimbursement of fees, and allow a reserve to be set up to ensure payment. The only real question is whether the trust provisions conflict with ERISA. They do not. While an award of fees to a losing defendant certainly would contravene Congress' intent, *see* 29 U.S.C. § 1110(a), plaintiffs point us to no statutory or common-law basis for denying fees to a *prevailing* trustee where the trust documents specifically contemplate such reimbursement.
>
> Plaintiffs argue that this result unjustly deprives the beneficiaries of their funds. We sympathize, to the extent that plaintiffs think that it is disgraceful for pensioners to be

> deprived of their benefits because of this seemingly endless litigation. . . . Defendants *prevailed* as to most of the claims. . . . Defendants expended great sums of money defending meritless claims. Very few people would become plan administrators if subjected to such unjust, extensive potential costs. Reimbursement here conformed with the trust documents and ERISA. We therefore affirm that aspect of the district court's holding."

Leigh II, 838 F.2d at 369 (emphasis in original).

Petitioner makes much out of the facts that FirsTier argued that it was not a fiduciary with respect to the Plan and that it raised jurisdictional objections to the participants' counterclaims. The issue of whether FirsTier is a fiduciary with respect to the Plan is directly connected to its original application to the court to determine its status with respect to the Plan.

It is a truism that the issue of a court's jurisdiction to hear a matter may be raised and argued at any time. If the Counter-Plaintiffs had followed the proper procedures of serving copies of their complaint upon the Secretaries of Labor and Treasury as required by ERISA Section 502(h), 29 U.S.C. § 1132(h), FirsTier would have had no reason to raise and press the issue of the courts' jurisdiction. Petitioner should not now complain of attorneys fees and expenses incurred as a result of his own failure to follow the simple and clear service requirements set forth in ERISA.

In summary, it is clear that the trial court did not abuse its discretion in awarding FirsTier's reasonable

attorneys' fees and expenses in connection with this action as authorized by the Plan and ERISA.

V. THE RICO CLAIM FAILED TO ALLEGE SUFFICIENT FACTS ESTABLISHING A PATTERN OF RACKETEERING WHERE THE UNREFUTED FACTS ESTABLISHED THAT THE TRUSTEE DID NOT KNOW THE PURPOSES OF PARTICIPANT LOANS WHICH OCCURRED THREE YEARS BEFORE THE FOUR ISOLATED LOANS WHICH OCCURRED OVER A ONE OR TWO DAY PERIOD.

RICO requires proof of predicate acts, and there can be no RICO liability here because the trial court ultimately found from the evidence that FirsTier did not breach its fiduciary duties as trustee of the Plan. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496, 105 S. Ct. 3275, 3285, 87 L. Ed. 2d 346, 358-59 (1985). The trial court's Findings of Fact will not be disturbed on appeal unless clearly erroneous. *Sun Ref. and Mktg. Co. v. Goldstein Oil Co.*, 801 F.2d 343, 346 (8th Cir. 1986); *Griffin v. City of Omaha*, 785 F.2d 620, 625 (8th Cir. 1986).

The term "racketeering activity" under RICO refers to "predicate acts" which are defined as any certain "chargeable" or "indictable" acts enumerated in 18 U.S.C. § 1961(1)(A). Petitioner contends that FirsTier willfully embezzled funds from the Plan in violation of 18 U.S.C. § 664. To prevail, Petitioner had to prove that FirsTier **willfully breached** its fiduciary duties to participants. *See* 18 U.S.C. § 664(a) (1991); *United States v. Andreen*, 628 F.2d 1236, 1241 (9th Cir. 1980); *United States v. Felice*, 481 F.Supp. 79 (N.D. Ohio 1979).

In dismissing the Counter-Plaintiffs' RICO claim, the trial court stated that:

> "Mr. Lonergan neither talked to anyone at FirsTier regarding the February 22, 1984 loan nor disclosed the purposes of the borrowing; FirsTier had no knowledge of the loan's purposes. . . . The counter-plaintiffs . . . have not produced any evidence tending to show that Firstier [sic] had knowledge of the purpose of the $42,500 loan made . . . in 1984, or that the making of the loan was improper. Thus, the Court finds as a matter of law that FirsTier has not breached any fiduciary duty in regard to the $42,500 loan."

(App. 8).

After a four day trial, the Counter-Plaintiffs were still unable to produce any evidence that FirsTier committed any acts in violation of 18 U.S.C. § 664. (App. 20). The trial court specifically found that FirsTier did not violate its fiduciary duties in making the participant loans. (App. 22-24).

VI. FIRSTIER IS NOT LIABLE UNDER RICO BECAUSE FIRSTIER DID NOT BREACH ITS FIDUCIARY DUTIES WHEN IT MADE THE PARTICIPANT LOANS. FURTHER, PETITIONER'S RICO CLAIM FAILED TO ALLEGE SUFFICIENT FACTS TO ESTABLISH A PATTERN OF RACKETEERING IN CONNECTION WITH FOUR ISOLATED LOANS ALLEGED TO HAVE OCCURRED OVER A ONE OR TWO DAY PERIOD.

This Court in *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 106 L. Ed. 2d 195, 109 S. Ct. 2893 (1989) established that the continuity of criminal conduct required to

establish a "pattern" of racketeering activity under 18 U.S.C. § 1962 may be established in two ways. A party alleging a RICO violation may demonstrate continuity during a closed-end time by showing numerous predicate acts extending over a substantial period of time. In the alternative, a party must allege predicate acts that, by their nature, demonstrate a "threat of continuity." *Lange v. Hocker*, 940 F.2d 359, 361 (8th Cir. 1991).

The Counter-Plaintiffs failed to allege or prove sufficient facts to demonstrate continuity under either approach. RICO claims in which the allegations of close-ended continuity occurring during a very short duration of the alleged scheme fail to show "related predicate acts extending over a substantial period of time." *H.J. Inc.*, 492 U.S. at 242, 109 S. Ct. at ___, 106 L. Ed. 2d at 209. In *Lange v. Hocker, supra*, the court stated:

> "Read in the light most favorable to the plaintiffs, the complaint alleges that a number of predicate acts (namely, wire and mail fraud and the illegal corporate transaction) were committed between August 25, 1988 and September 21, 1988. Acts committed in such a short time span do not constitute a pattern of racketeering activity. 'Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy [the continuity] requirement. . . . ' "

Id. at 361 (footnote omitted).

The gravamen of the Counter-Plaintiffs complaint centered around four participant loans FirsTier made over a total period of ONLY one or two days. (App. 21).

Since the trial court found that FirsTier had no knowledge of the purposes of loans that were made three years earlier, it could not have willfully participated in a conspiracy to embezzle pension funds or willfully breached a fiduciary duty within the meaning of 18 U.S.C. § 664 with respect to such loans. (App. 8). Not only were the number of alleged predicate acts few, but the notion that close-ended continuity could be created in such a short period of time does not comport with the stated goals of RICO. Furthermore, there was absolutely no threat of ongoing future "criminal conduct," since the Company had ceased operations within three months of the loans.

The participants did not allege any facts in their counterclaim even suggesting "threat of continuity." In *Terry A. Lambert Plumbing, Inc. v. Western Sec. Bank*, 934 F.2d 976 (8th Cir. 1991), the Eighth Circuit Court articulated three situations in which the threat of continued criminal activity could be shown:

> "(1) the predicate acts themselves involve an actual threat of long-term racketeering activity, either implicit or explicit, (2) 'the predicate acts or offenses are part of an ongoing entity's regular way of doing business, or (3) the predicate acts 'are a regular way of conducting [an] ongoing legitimate business' (in the sense that it is not a business that exists for criminal purposes). . . . ' "

Id. at 980 (*quoting H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, at 242-43, 109 S. Ct. at ___, 106 L. Ed. 2d at 209-10 (footnote omitted)).

A threat of continuing criminal activity cannot be established by alleging a single transaction to a single

victim over a short period of time. As this Court noted in *H.J. Inc., supra,* several related acts over a very short period of time do not satisfy the continuity requirement for a pattern of racketeering.

After a four day trial on the merits of the participants' ERISA claims, the trial court concluded that FirsTier did not breach any fiduciary duties as trustee of the Plan, FirsTier's loan department did not know the source of the credit loan payments from the company and neither the company's president nor anyone else threatened or coerced the participants into borrowing money from the Plan or into loaning the money to the president or the company. (App. 20). These findings were specifically affirmed by the Eighth Circuit Court of Appeals. (App. 49).

In summary, even if there were a reversal of the trial court's ruling dismissing the participants' RICO claim, there can be no liability because the trial court properly concluded that FirsTier did not breach its fiduciary duties.

CONCLUSION

FirsTier requests that the Petition for Writ of Certiorari be denied and FirsTier be awarded its attorneys fees and expenses in connection with the preparation of this Brief in Opposition. Such action is in accord with the express provisions of ERISA, with the terms of the Plan and with the evidence which was fully litigated and adduced in the trial court and affirmed by the Eighth Circuit Court of Appeals.

Respectfully submitted,

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